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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 187

JOEL A. MALOY AND RUTH MALOY, HIS WIFE,
Petitioners,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WEST PALM BEACH, A CORPORATION EXISTING UNDER THE LAWS OF THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

WOOD & COBB, ESQS.,
Attorneys for Respondent,
232 South County Road,
Palm Beach, Fla.

JOEL A. MALOY and RUTH MALOY,
His Wife, in Proper Person,
105 S. E. 4th Avenue,
Delray Beach, Fla.,
Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

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FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WEST PALM BEACH, A CORPORATION EXISTING UNDER THE LAWS OF THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Joel A. Maloy and Ruth Maloy, his Wife, in proper person, respectfully shows unto this Honorable Court:

I. Opinions of the Courts Below

1. Order for Summary Final Decree and Summary Final Decree of the 15th Judicial Circuit of Florida in and for Palm Beach County. Order denying Petition for Rehearing. (R. 25, 27, 41).

2. Opinion of District Court of Appeal of Florida, Second District, one word "affirmed". Order denying Petition for Rehearing: *Maloy* v. *First Federal Savings &*

Loan Association of West Palm Beach, 107 So. 2nd 405 (R. 49, 60).

3. Order of Supreme Court of Florida, denying Petition for Writ of Certiorari to District Court of Appeal. *Maloy* v. *First Federal Savings & Loan Assn.*, 109 So. 2nd 574 (R. 22, copy attached).

II. Grounds of Jurisdiction

1. Supreme Court of Florida has sanctioned so far a departure from the accepted and usual course of judicial proceedings by a lower court as to call for this Court's power of supervision, under Federal and State Constitutional guarantees of trial by due process of law. Trial Court granted Motion for Summary Final Decree to which is attached photostatic copy of an "account card" and an affidavit as to failure to pay installments due on it and pursuant to rules for payment, not the promissory note and mortgage sought to be foreclosed and an affidavit as to failure to pay installments due thereon and in accordance with provisions thereof.

2. Date and entry of Order of Supreme Court denying Petition and final judgment, is February 4, 1959. This Honorable Court on May 6, 1959, entered Order extending time for filing Petition for Certiorari to and including July 4, 1959.

3. It is believed that Section 1257 (2) of 28 U. S. C. sustains the jurisdiction of the Supreme Court of the United States.

III. Question Involved

Where defendants alleged in mortgage foreclosure complaint to be in default for failure to pay installments due on promissory note secured by mortgage sought to be foreclosed and of taxes are proved found and held to be in default for failure to pay installments due on plaintiff's "account card" and pursuant to its rules for payment, did they receive a fair and impartial trial under the due process

of law guaranties of our Federal Constitution and the Constitution of the United States?

IV. Constitutional Provisions Involved

1. Constitution of the United States.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U. S. C. Const. Amend. XIV Sec. 1.

2. Constitution of the State of Florida.

"All courts of this State shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy in due course of law and right and justice shall be administered without sale, denial or delay." Declaration of Rights, Sec. 1. F. S. A. Vol. 25 p. 518.

V. Concise Statement of the Case

Joel A. Maloy and Ruth Maloy executed on February 15, 1956 the promissory note secured by mortgage sought to be foreclosed, and paid installments due 20th of each month until book furnished showed excess $4,276.30 balance after payment of April 20, 1957, paid by check inadvertently dated April 30, instead of $4,255.01.

Complaint filed August 15, 1957 and paragraph 2 alleges:

"(2) The defendants, Joel A. Maloy and Ruth Maloy, his wife, have not paid any installments due on the said promissory note since May 1, 1957 when they paid the

installment due April 20, 1957. The said defendants also did not pay taxes for 1956 on the mortgaged property due to the City of Delray Beach * * *." (R. 1. Copy note and mortgage R. 3)

Answer of defendants filed October 28, 1957 denies paragraph 2. And there stands uncontradicted affirmative defenses of no defaults, plaintiff demanding installment payments due on "account card" to its advantage and taxes not paid having been tripled, paid to compel payment. Vice President Campbell threatening foreclosure in letter of June 7 unless May 20th paid on account, advised taxes paid June 3. And in letter of July 9 threatening to send the "account to our attorneys" for collection and possible foreclosure, advised $4,276.30 is balance due on "account card" and of rules for payment said: "The method of posting used by the Association follows these two rules among others, * * *." Exhibits "C" and "D". (R. 7, 15 and 17).

Motion for Summary Final Decree of plaintiff filed Nov. 18, 1957 on ground there is no genuine issue as to any material fact, as complaint alleges default and defendants admit failure to pay installments due on the "account card" states:

> "(4) * * *. Attached is a copy of the *account card* from plaintiff's records *pertaining to this account* and an affidavit * * *. An examination of the affidavit and account card shows the balance of the account as of May 1, 1957 was in fact $4,276.30". (R. 30)

And the affidavit attached avers:

> "* * *; attached is a copy of the *account card* from the Association's records *pertaining to the account of Joel A. Maloy and Ruth Maloy his wife;* that said copy

shows the status and history of the said account from its inception * * *; Affiant further says that the balance of the account as of May 1, 1957 * * * was $4,276.30." (R. 20)

(Account Card shows interest on interest charges of $21.39 and $21.50 on April 30 and May 1, 1957. R. 21)

Defendants' Motion for Summary Final Decree filed Nov. 27, 1957 on ground there is no genuine issue as to any material fact, defendants entitled to Summary Final Decree as a matter of law. (R. 22)

Order for Summary Final Decree dated Jan. 8, 1958, the Court finding: There is no genuine issue as to any material fact. Defendants in default for failure to pay "any installments of said promissory note subsequent to the installment due April 20, 1957" and "1956 taxes due to the City of Delray Beach". Defendants admit failure to make payments due on the account,

> "The Court has examined the affidavit made by the Treasurer of plaintiff and attached copy of the *plaintiff's account card pertaining to this mortgage* and finds no error in the calculations,"

and plaintiff entitled to Summary Final Decree as a matter of law, granted its Motion and denied defendants'. (R. 25)

Summary Final Decree dated and entered Jan. 8, 1958 orders sale of property if sums found due not paid within 21 days. (R. 27).

Constitutional Question sought to be reviewed was raised in the Circuit Court by Petition for Rehearing filed Jan. 17, 1958 on the ground the Court departed from the accepted and usual course of judicial proceedings. States defendants signed promissory note not an "account card" its use to plaintiff's advantage. (par. 1 and 2, R. 29-34). That

defendants required to pay on note and in accordance with its provisions cannot be required to pay on "account card" and pursuant to its rules or for failure held in default for failure to pay installments due on note or taxes paid to compel payment. (par. 3 and 4, R. 35-37). Order dated Jan. 24, 1958 denied Petition and "ratified and confirmed" Order and Decree entered. (R. 41).

And in the District Court of Appeal by Assignments of Error filed March 6, 1958 on the ground the Court departed in its findings: States Court erred in finding default for failure to pay on "copy of something plaintiff refers to as an account card" and affidavit "in complete and utter disregard of note and its provisions". (No. 1; R. 42). In finding plaintiff entitled to Summary Final Decree as a matter of law on mere statements in Motion of default and there no proof nor attached note and affidavit as to default for failure to pay either installments due on note or taxes and instead the said "account card" and affidavit as to purpose and use of the same. (No. 7, R. 45). Erred in interpretation of facts and law. (No. 16, R. 49). Opinion dated Sept. 19, 1958 of one word affirmed trial court. (R. 49).

Also by Petition for Rehearing filed Oct. 3, 1958 on the ground Constitutional rights denied, State and Federal. States it is believed Court through oversight affirmed lower court, record showing no proof of default as required by law. (par. 1, R. 50). That allegations in complaint not proved nor promissory note and mortgage offered in proof of failure to pay installments due or taxes in accordance with provisions thereof. (par. 1(b) R. 50). That not in default yet held in default and their property ordered taken from them.

> "Petitioners have been denied those inalienable rights guaranteed in and by the Constitution of the State of

Florida, Section 4 of the Declaration of Rights providing: 'All courts of this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy in due course of law and right and justice shall be administered without sale, denial or delay.'

And the Constitution of the United States, Amendment XIV Section 1 providing: '* *; nor shall any state deprive any person of life, liberty or property without due process of the law.' '' (par. 2, R. 53).

Order dated Oct. 28, 1958 denied without Opinion. (R. 58).

And in the Supreme Court on ground Constitutional rights denied, by Petition for Certiorari filed Dec. 26, 1958. States the record shows petitioners not proved and found in default as required by law, their property ordered taken from them, having been held in default.

''That petitioners have been denied their inalienable rights guaranteed in and by the Constitution of the State of Florida, Section 4 of the Declaration of Rights providing: 'All courts of this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy in due course of law.'

And the Constitution of the United States, Amendment XIV, Section 1 providing: '* * nor shall any state deprive any person of * * property without due process of the law.' '' (par. 4(i) R. 17)

Order dated February 4, 1959 denied without opinion. (R. 22).

Notice of Appeal to Supreme Court of the United States filed in District Court of Appeal Second District, April 30, 1959. (R. 61).

VI. Reasons Relied on for the Allowance of the Writ

1. That the decision of the Supreme Court of Florida contrary to the due process clause of the Constitution of the United States.

2. That the denial of petitioners' Motion for Summary Final Decree was a denial of rights guaranteed under the Constitution of the State of Florida, under Section 4 of the Declaration of Rights.

3. That the holding of default for failure of a mortgagor to pay installments due on promissory note secured by mortgage sought to be foreclosed and for failure to pay taxes, was a denial of a fair and impartial trial, under the laws and the Constitution of the State of Florida and the United States, under the facts of this case.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the District Court of Appeal of Florida, Second District, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case Numbered and entitled on its docket No. 523 Joel A. Maloy and Ruth Maloy, his wife, appellants vs. First Federal Savings and Loan Association of West Palm Beach, appellee and that the said Final Judgment of the Supreme Court of the State of Florida may be reversed by this Honorable Court, and your petitioners may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioners will ever pray.

JOEL A. MALOY,
RUTH MALOY,
Petitioners.

IN THE SUPREME COURT OF FLORIDA

January Term, A.D. 1959

Wednesday, February 4, 1959

JOEL A. MALOY AND RUTH MALOY, HIS WIFE, PETITIONERS

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WEST PALM BEACH, a corporation existing under the laws of the United States of America, RESPONDENT.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the Order of the District Court of Appeal of Florida, Second District, in said cause bearing date of September 19, 1958, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy.

Test.

s/ GUYTE P. MCCORD,
Clerk Supreme Court.

(Supreme Court Seal)

(6285-1)

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JOEL A. MALOY AND RUTH MALOY, His Wife,
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v.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WEST PALM BEACH, A Corporation Existing Under The Laws Of The United States Of America,
Respondent

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Second District

MEMORANDUM OF RESPONDENT IN OPPOSITION

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Washington 6, D. C.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WEST PALM BEACH, A Corporation Existing Under The Laws Of The United States Of America,
Respondent

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Second District

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MEMORANDUM OF RESPONDENT IN OPPOSITION

This Petition should be denied; it is an incredible prolongation of a cavil over $21.29 raised and rejected in a foreclosure proceeding under an amortizing home mortgage filed in a state court and decided under state law. It does not touch a Federal question.

STATEMENT

The complaint for foreclosure was filed by Respondent on August 15, 1957 in the State trial court, the Circuit Court of Palm Beach County. It alleged that there had been default in payments on the mortgage note since May 1, 1957 and that property taxes for 1956 finally due in June, 1957 had not been paid as provided by the mortgage; a copy of the mortgage containing a copy of the mortgage note was attached to the complaint. The answer contained the affirmative defense that the balance due on the mortgage note as of May 1, 1957 as reported to Petitioners by Respondent was erroneous and excessive in the amount of $21.29 because the balance reflected an alleged improper method of calculation under the note and mortgage and that, until this alleged error in the amount of $21.29 was cleared up to their satisfaction, the Petitioners were excused from their admitted failure to make monthly installment payments on the mortgage note. Petitioners also admitted failure to pay the taxes and assigned as reasons therefor an increase in taxes in 1956 over 1955.

On cross motions for summary final decree, the trial court found the Petitioners to be in default for their admitted failure to pay installments on the note after May 1, 1957 and for failure to pay the 1956 property taxes.

The trial court then proceeded to examine the evidence on the disputed $21.29 and found that the method of calculation employed by Respondent corresponded with the mortgage note. It further found that there was no miscalculation included in the balance due May 1, 1957.

The trial court ordered a foreclosure sale 21 days from the date of its findings and order unless Petitioners paid the sums found by the trial court to be due and owing.

The Federal Constitutional Issue Was Not Raised Below

Ever since, the Petitioners have set out in countless papers filed with the courts in Florida their lengthy version of the calculations which would eliminate the disputed $21.29. But at no place in the trial court proceedings was there even a mention or a suggestion of a Federal constitutional question. Not until Petitioners filed a motion for rehearing in the District Court of Appeals was any reference made to the Constitution of the United States. At that point, for the first time, the contention was advanced that Federal due process had somehow been violated by the trial court's consideration of the account card:

> "That as a matter of fact, it is apparent that respondent attempted to prove petitioners in default for their failure to pay installments due on a paper respondent refers to as its ACCOUNT CARD.
>
> * * *
>
> "That as a matter of fact, it is apparent in the record on appeal that your petitioners not having been alleged and proved or found and held in default as required by law, the holding of the Court is, as stated and argued in petitioners' Assignments of Error and Briefs, *although not a specific Assignment of Error*, contrary to and a denial of the provisions of our State and Federal Constitutions, guaranteeing to every citizen trial by Due Process of the law." (Emphasis added) Motion for Rehearing, District Court of Appeals, page 6.

Such a tardy assertion of a Federal constitutional claim was inadequate under Florida law. See *Hanson v. Denckla*, 357 U.S. 235, 243-244 (1958). Moreover, even if this claim be considered a substantial one, none of the Florida courts considered or passed upon it; nor was it necessarily involved in their disposition of the case. This Court, therefore, is without jurisdiction to consider Petitioners' belated Federal claim.

No Cognizable Federal Claim Has Been Asserted

Petitioners now argue that the state trial court "departed from the accepted and usual course of judicial proceedings" in that the court considered the account card in determining whether there had been a default under the mortgage. Even assuming that such action by the court was inconsistent with Florida law, as alleged, no Federal question of substance is present so as to give this Court jurisdiction to review the case. This Court has no power to consider state court rulings which are said to be inconsistent with state law or procedure. Jurisdiction to consider rulings which have allegedly "departed from the accepted and usual course of judicial proceedings" is limited to rulings of lower Federal courts. See Rule 19(1)(b) of this Court's Rules. A state court's failure to follow state law has never been deemed to raise a Federal constitutional issue so as to give this Court jurisdiction on certiorari.

The Petitioners Were Not Denied Federal Due Process of Law

Here the Petitioners were in default on their mortgage for reasons that they admitted in their pleadings. Even if the trial court had ignored the account card, it would have been compelled to find them in default and to order the foreclosure sale.

The complaint that the Petitioners bring to this Court is that because the trial court did not grant their own Motion for Summary Final Decree and because they were not proved in default or determined in default with the correct words and language under their interpretation of State law, they have been denied Federal due process of law. To state their complaint here is to answer it.

CONCLUSION

The Petition should be denied. It does not raise a Federal question. It is frivolous in the extreme.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

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FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WEST PALM BEACH, a corporation existing under the laws of the United States of America,
Respondent

PETITIONER'S REPLY BRIEF TO RESPONDENT'S MEMORANDUM

JOEL A. MALOY,
RUTH MALOY,
Petitioners,
405 S. E. 4th Avenue,
Delray Beach, Florida.

SUPREME COURT OF THE UNITED STATES

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Respondent

PETITIONER'S REPLY BRIEF TO RESPONDENT'S MEMORANDUM

Respondent would have this Court believe that the $21.29 mentioned in the opening paragraph and repeatedly throughout its memorandum, was merely a miscalculation which petitioners used as an excuse for failure to pay installments due under an amortizing home mortgage. Hence no Federal question involved.

Not only is a Federal question involved, the decision sought to be reviewed has no precedent in the history of law. There no case where a man accused of stealing a horse, tried and convicted of stealing a cow. That is the case here. Accused of default for failure to pay installments due on promissory note secured by mortgage sought to be foreclosed, petitioners tried and convicted for failure to pay installments due on ACCOUNT CARD, attached to and by reference made part of Motion for Summary Final

Decree and supporting affidavit (R. 19-20) granted by Trial Court. (R. 25) A fact respondent carefully failed to mention. Original promissory note and mortgage sued on not offered in proof of default, are not before this Court.

Statement of the Case

In a desperate attempt to prove its point, considerable liberty is taken of the record in Respondent's Statement. Each and every one contradicted by the record, as follows.

First; Answer to the complaint specifically denied allegations of default for failure to pay installments due on promissory note and taxes, states: "Defendants deny the allegations of paragraph 2 of the Complaint." (R. 7)

And there stands uncontradicted affirmative defenses of no defaults because of substitution in place of promissory note and its provisions for payment of installments due, the Account Card and its rules for payment to Respondent's advantage and taxes paid without notice to compel payment. The promissory note dated Feb. 14, 1956 in principal sum of $4,586.24 provides for monthly installment payments of $45 each, interest at 6% per annum and a *30 days grace period*. (R. 4) The Account Card rules allow among other things, charging of interest on interest if payment 10 days late, of which Respondent advised in letter of July 7, 1957.

(Photostatic copy attached to Answer as Exhibit "D" R. 16)

Petitioners not advised of such substitution until repeated requests in letters of May 7 and June 10, for prompt correction of excessive $4,276.30 balance, so as to pay May 20 installment, shown due in book furnished at time of signing promissory note after payment of April 20, installment, paid by check inadvertently dated April 30

when mailed instead of $4,255.01, *an excess of $21.29*, and proper crediting of $90 check: (Exhibit "A" R. 14)

Date	Interest charged	Payment	Balance
Feb 20-57	Y**21.63	Feb & Mar L***90.00	4,257.12
Mar 29			
May 1-57	**21.29		4,278.41
Apr 30-57	**21.39		4,278.51
May 1-57	**21.50	L***45.00	~~4,255.01~~
May 1-57	A***0.00		4,276.30

Respondent ignoring request, first threatened foreclosure unless May 20 installment paid and advising taxes paid (not paid having been tripled and permission given to seek reduction along with other indignant citizens) in letter of June 7, said:

> "My attention has been directed to the fact that your May Mortgage Loan payment of $45 due on the 20th of May has not been received at this office. I must assume that this is an oversight on your part as I am certain you would not wish to place your property in jeopardy due to failure to meet your mortgage loan payments. The situation is complicated by the fact that you also did not pay the 1956 * taxes. So the Association paid these taxes for you. These taxes * were paid on June 3 and charged to your *mortgage loan account*. (Emphasis added. Photostatic copy Exhibit "C" R. 15)

Finally, but first again threatening foreclosure, respondent in said letter of July 7 advised the $4,276.30 is balance due on the Account Card; *all prior and future installment payments paid and required to be paid on and pursuant to its rules for payment*; it was *believed loan had been allowed to go into default because of a misconception as to the proper method of posting accounts and* of the rules under which April 20 installment paid by check inadvertently dated April 30 an "omitted payment" and not

credited until May 1, so as to charge as of April 30 and May 1 unauthorized interest on interest of $21.39 and $21.50, said:

> "*This account is now in default* * *. You may if you wish bring this mortgage current by paying the omitted installments and taxes *. This should be done immediately as it is our intention to send this account to our attorneys' office for collection in which event you will then become liable for attorneys fees and other costs, including possible foreclosure costs. We have reviewed the entire file and believe your have allowed this loan to go into default because of a misconception on your part as to the proper method of posting accounts. *The method of posting used by the Association follows these two rules among others.* (Emphasis added)
>
> 1. The amount posted in the last column of your payment book is the balance of the loan as of the first day of the month shown in the first column. This balance does not include interest accrued since the first of the month.
>
> 2. Interest accruing for a particular month is not added to the account until the next succeeding month when a payment is made; if no payment is made during the next succeeding month the interest is added on the last business day of such next succeeding month. *This method takes care of pre-payments as well as omitted payments.* (Emphasis added)
>
> *The April, 1957 payment being omitted*, the interest for the month of March in the amount of *$21.39* was added to the account on April 30, 1957 and the *resulting balance $4,299.80* was the balance as of April 1, 1957. *The April, 1957 payment* in the sum of $45.00 was *made on May 1, 1957*. Interest for the month of April in the amount of *$21.50* was added to the account at this time and the *resulting balance $4,276.30* was the balance as of May 1, 1957. (R. 7 thru 13)

Respondent continued to threaten foreclosure in Letter of July 22, stating *Account* turned over to attorneys, who

in turn in letter of July 29 threatened foreclosure unless installments due on *Account* and taxes paid. (Photostatic copies "E" and "F" R. 18) Payment on the *Account card* refused, suit filed August 15, 1957, to compel payment or acquire property by way of suit in equity.

SECOND: Respondent's Motion for Summary Final Decree claiming default for admitted failure to pay installments due on ACCOUNT CARD, states:

> "It is contended by defendants that their failure to make payments of installments subsequent to the installment due April 20, 1957 was occasioned by an improper posting of interest to the account. * * and defendants assign this alleged error as an excuse for their failure to make payment of installments. *The disputed balance of $4,276.30 is the result of mathematical calculations based upon the date of said promissory note, the original balance* * *. Attached is a copy of the account card * * pertaining to this account and an affidavit by MARGARET M. PETERS *. *An examination of the affidavit and account card shows the balance of the account as of May 1, 1957 is in fact $4,276.30.* (Emphasis added R. 19)

And the attached affidavit avers:

> " * *; that attached hereto is a copy of the account card * pertaining to the account of JOEL A. MALOY and RUTH MALOY * which is involved in the instant suit; that said copy shows the status and history of said account from its inception; affiant further says that the *balance of said account as of May 1, 1957 was $4,276.30.*" (Emphasis added. R. 20)

THIRD: Order for Summary Final Decree finding default for admitted failure to pay installments due on the ACCOUNT CARD, states:

> "(3) That the said defendants are in default for failure to pay any installments of said promissory note subsequent to the installment due April 20, 1957. The said defendant admits that such payments have

not been made but contend that failure to make such payments was occasioned by plaintiff's improperly posting interest to the account. *The Court has examined the affidavit* made by the Treasurer of plaintiff and the *attached copy of the plaintiff's account card pertaining to this mortgage* and finds no error in the calculations. The failure of plaintiff to credit the check dated April 30, 1957 until May 1, 1957 will be disregarded as the check was post-dated when sent to plaintiff which necessitated its being handled out of the ordinary course of business.

(4) That the said defendants are in default for failure to pay the 1956 taxes due to the City of Delray Beach on the mortgaged property which taxes were paid by the plaintiff on June 3, 1957. (Emphasis added. R. 26)

Federal Question Sought To Be Reviewed Raised Below

Here again in stating Federal question not raised below, Respondent takes leave of the record. The "countless papers" respondent refers to as being filed to eliminate the $21.29, so erroneous and preposterous it is wondered if it is talking about same record, or substituted another, as it did the ACCOUNT CARD. Also its statement that it was not until the filing in the District Court of "Motion for Rehearing" was it claimed that "*Federal due process had somehow been violated by the trial court's consideration of the account card.*"

With such a record there is no doubt but that Federal question sought to be reviewed was raised and passed on by trial and appellate courts; as to whether or not the trial court departed from the accepted and usual course of judicial proceedings in holding a mortgagor failing to pay on mortgagee's ACCOUNT CARD and pursuant to its tricky fraudulent and deceitful rules to its advantage, mortgagor in default in payment of installments due on promissory note secured by mortgage sought to be fore-

closed and of taxes, paid to compel payment on the ACCOUNT CARD.

Trial Court considered Petition for Rehearing on ground it departed in such findings and Order denying "Ratified and confirmed" Order for Summary Final Decree. (R. 41).

District Court considered Assignments of Error (R. 42). Brief and transcript on same ground and one word Opinion affirmed trial court, thereby denying respondent attorneys fees to which it entitled if petitioners in default. (R. 49). Petition for Rehearing (R. 49) on same ground and that such findings denial of constitutional guarantees of trial by due process of law, State and Federal. In addition pointed out that Court failed in the interest of justice to apply one of its own rules;

> "It is believed that this Court omitted in the interest of justice, to find applicable one of its rules, to-wit: Rule 3.7(i) providing:
>
> "* * However, the Court in the interest of justice may notice * * fundamental error apparent in the record-on-appeal, whether or not it has been argued in the briefs or made the subject of an Assignment of Error."
>
> And, it apparent in the record-on-appeal in this cause that your petitioners are not alleged, proved or found in default for their failure and refusal to pay installments due on the note secured by mortgage sought to be foreclosed, or of taxes, yet are held to be in default and their property ordered taken from them, petitioners have been denied those inalienable rights guaranteed in and by the Constitution of the State of Florida, Section 4 of the Declaration of Rights providing:
>
> 'All courts in this State shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice shall be administered without sale, denial or delay.

And the Constitution of the United States, Amendment XIV Section 1, providing:

> "* *; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law. (R. 53)

Supreme Court considered the Petition for Writ of Certiorari in which included above paragraph as among facts submitted to District Court, in compliance with suggested form—and its Order states: "* *and the record having been inspected.*" (R. 22)

Respondent attempts to prove its point by quoting only portions of Petition for Rehearing filed in District Court, Petitioners of course referring to the fact that State and Federal law requires that allegations of complaint be proved at hearing on bill and answer, unless admitted, in stating respondent attempted to prove default for failure to pay on the ACCOUNT CARD. Its next quotation is preliminary to the one above. And respondent's repeated reference to "Motion for Rehearing" appears because its one cited case is where this Court denied Motion for Rehearing, in no way applicable here.

Cognizable Federal Claim Asserted

In final effort, Respondent claims this Court barred from consideration of a state court's departure from the accepted and usual course of judicial proceedings under Rule 19 (1)(b). The same rule(2) provides: "The same general consideration outlined above will control in respect * * of any other courts whose determinations are by law reviewable on writ of certiorari."

Petitioners Denied Federal Due Process of Law

Record speaks for itself, we say in reply to Respondent's statement petitioners not denied Federal due process of law. And this Court should ask: Why no attempt to prove

default for failure to pay on the note and mortgage. Answer, respondent only interested in court's approval of substitution of the ACCOUNT CARD. We have nothing to fear of foreign country where a mortgagee can compel mortgagor to pay installments due on an ACCOUNT CARD or any other paper substituted for promissory note and whatever rules enforced, or lose home. And in view of respondent's position point out that Regarding its Method of posting accounts *there also stands uncontradicted this statement in the Answer:*

> "13. *That plaintiff's methods of transacting business is generally known and recognized as a 'racket' and defendant Ruth Maloy now understands the remarks with reference thereto, by one party indignantly as a plain 'racket' and another as the 'sweetest racket in West Palm Beach'*". (R 13)

Conclusion

The Petition should be granted. It raises a Federal question.

To say it does not, is to say the sun rises in the West. And a citizen fighting for his rights under the Constitution of the United States guaranteeing trial by due process of law, frivolous.

Respectfully submitted,

JOEL A. MALOY,
RUTH MALOY,
Petitioners,
405 S. E. 4th Avenue,
Delray Beach, Florida.

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FILED
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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 187.

JOEL A. MALOY and RUTH MALOY, His Wife,
Petitioners,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WEST PALM BEACH, a Corporation Existing Under the Laws of the United States of America,
Respondent.

PETITION FOR REHEARING.

JOEL A. MALOY,
RUTH MALOY, His Wife,
Petitioners,
405 S. E. 4th Avenue,
Delray Beach, Florida.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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Respondent.

PETITION FOR REHEARING.

Petitioners respectfully show unto this Honorable Court:

I.

Trial by due process of law was denied petitioners, at the hearing of this cause on complaint and answer. Suit brought by respondent as plaintiff to foreclose mortgage for failure to pay installments due on promissory note and city taxes.

Plaintiff's Motion for Summary Final Decree granted by trial court, **is on the ground that there is no genuine issue as to any material fact, as complaint alleges failure to pay installments due on note and taxes and the affirmative defenses of the answer admit failure to pay installments due on an Account Card** and pursuant to its rules for payment. And there is attached thereto and by reference made a part, not the promissory note and mortgage sued on, but a photostatic copy of an **Account Card** and affidavit as to payments due and with reference thereto states:

> "An examination of the affidavit and account card shows that the balance of the account as of May 1, 1957 is in fact $4,276.30."

And the supporting affidavit avers:

> "Before me the undersigned authority personally appeared Margaret M. Peters, who by me being first duly sworn deposes and says that she is Treasurer of First Federal Savings and Loan Association of West Palm Beach, plaintiff herein, and that among her duties is the supervision of records, **pertaining to the accounts of mortgages,** held by the Association; that attached hereto is a copy of the **account card** from the Association's records **pertaining to** the account of Joel A. Maloy and Ruth Maloy * * * which is involved in the instant suit; that said copy shows the status and history of said account from its inception. Affiant further says that the balance of said account as of May 1, 1957, * * * is accurately shown by said account card and was $4,276.30" (Emphasis added).

Defendants' Motion for Summary Final Decree denied by the trial court, **is on the ground that there is no genuine issue as to any material fact and defendants entitled to Summary Final Decree as a matter of law.** An-

swer denying defaults states: "Defendants deny the allegations of paragraph 2 of said complaint". And the affirmative defenses state that defendants not in default because of demand for payment of installments due on the Account Card and pursuant to its rules for payment to plaintiff's advantage. Taxes paid to compel payment, after giving permission to seek reduction because of trippling. That in reply to repeated requests for correction in letters of May 7 and June 10, 1957, of excessive $4,276.30 balance shown due in book furnished after payment of April 20 installment instead of $4,255.01, plaintiff firs threatened foreclosure and advised of payment of taxes, in letter of June 7. Exhibit "C". That again threatening foreclosure, plaintiff advised of requirement for payment on the **Account Card** and of rules—under which April 20 installment paid by check inadvertently dated April 30 when mailed, was an "omitted" payment and not credited until May 1 so as to charge and add to balance due interest of $21.39 on April 30 and $21.50 on May 1, in letter of July 9, Exhibit "D".

Order for Summary Final Decree entered by the trial court granting plaintiff's Motion as a matter of law for failure to pay on the **Account Card "pertaining to this mortgage"** and denying defendants finds:

> "(3) That the said defendants are in default for failure to pay any installments of said promissory note subsequent to the installment paid April 20, 1957.
>
> The said defendants admit that such payments have not been made but contend that failure to make such payments was occasioned by plaintiff's improperly posting interest to the account. **The Court has examined the affidavit made by the Treasurer of plaintiff and the attached copy of plaintiff's account card pertaining to this mortgage** and finds no error in the calculations.

"(4) That the said defendants are in default for failure to pay the 1956 taxes due to the City of Delray Beach on the mortgaged property which taxes were paid by the plaintiff."

And the Summary Final Decree orders sale of property.

II.

The trial court was required under Rule 1.36 of the Florida Rules of Civil Procedure to grant defendants' Motion, the plaintiff failing to meet the requirements for the filing of affidavits in proof of allegation of complaint of this rule, as follows:

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment or decree may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for Summary Judgment or Decree by the adverse party, move with or without supporting affidavit for a summary judgment or decree in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment or decree is sought may, at any time, move with or without supporting affidavit for a summary judgment or decree in his favor as to all or any part thereof.

(c) **Motion and Proceeding Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the date of hearing may serve opposing affidavits. The judgment or decree sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any shows that there is

no genuine issue as to any material fact and that the moving party is entitled to a judgment or decree as a matter of law. A Summary judgment or decree, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment or decree is not rendered upon the whole case or for all the relief asked and a trial, or the taking of testimony and a final hearing, is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial or final hearing of the action the facts so specified shall be deemed established, and the trial or final hearing shall be conducted accordingly.

(e) **Form of Affidavits:** Further testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or further affidavits.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court

may refuse the application for judgment or decree or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavit caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Florida Statutes Annotated, Vol. 30, p. 735.

In construing the provisions of this Rule, the Supreme Court of Florida has repeatedly held that summary judgment or decree is permissible only when the pleadings, depositions or admissions on file, together with the affidavits, if any show that there is no genuine issue of material fact and that the movant is entitled to judgment or decree as a matter of law. The Court so held in Humphrey v. Jarrell, App. 1958, 104 So. 2nd 404. And held that a summary decree may be obtained in a declaratory action, but the moving party must be entitled to judgment or decree as a matter of law in Pancoast v. Pancoast, App. 1957, 97 So. 2nd 875.

To the same effect is Rule 56 of the Federal Rules of Civil Procedure and decisions thereunder, providing:

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment, may at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judg-

ment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceeding Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue as to the amount of damages. As amended Dec. 27, 1946. Effective March 19, 1948.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case for all the relief asked and a trial is necessary, the court at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable, ascertain what material facts exist without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits: Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any defending party or attorney may be adjudged guilty of contempt.

United States Code Annotated, Vol. 28, p. 153.

Under this Rule, this Court held that a motion for summary final decree may be granted only where the pleadings, depositions and admissions on file, together with any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. U. S. v. Costa, D. C. Del.

1955, and again in Armstrong v. Avco Mfg. Corp., D. C. Del., 1955, 137 F. Supp. 680, where this court held moving party entitled to summary judgment, where truth is clear.

III.

Appeal brought under Rule 19 (1) (b) providing this court will take jurisdiction where a court has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. And 19 (2) that the Court will where by any court whose determinations are by law reviewable on writ of certiorari.

There can be no greater than where an accused charged with certain offense, tried and convicted of another. And with such a record showing trial court held mortgagor's admitted failure to pay on an Account Card, proof of failure to pay installments due on note and taxes, there no doubt but that Federal question sought to be reviewed was raised and passed on by trial and appellate courts of Florida.

Trial Court "ratified and confirmed" entry of Order for Summary Final Decree, when departure pointed out in Petition for Rehearing stating defendants signed promissory note, not the Account Card offered in proof of default (3-12); that required to pay on note, not required to pay on Account Card or failing held in default in payment of installments due on note or taxes, paid to compel payment (pp. 14-17).

District Court of Appeal in one word Opinion affirmed trial Court, having considered Assignments of Error stating Court erred in finding default for failure to pay on the Account Card and an affidavit as to its requirements (No. 1). In finding plaintiff entitled to Summary Final Decree as a matter of law, where the Motion merely states failure

to pay and there no proof of failure to pay installments due on note or taxes in accordance with provisions of note and mortgage, nor the same attached. No. 7. Erred in interpretation of facts and law. No. 16.

District Court of Appeal denied Petition for Rehearing, stating that petitioners not proved and found in default as required by law (Par. 1 [9]) * * * yet are held to be in default and their property ordered taken from them, and stating:

> "Petitioners have been denied those inalienable rights guaranteed in and by the Constitution of the State of Florida, Section 4 of the Declaration of Rights, providing: 'All courts of this State shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy in due course of law and right and justice shall be administered without sale, denial or delay.'
>
> And the Constitution of the United States, Amendment XIV, Section 1, providing: '* * *; nor shall any state deprive any person of life, liberty or property without due process of the law * * *' " (Par. 2 [3, 4]).

Supreme Court of Florida denied Petition for Writ of Certiorari and the Order states: "* * * and the record having been inspected." Petition states the record shows petitioners not proved and found in default as required by law, their property ordered taken from them, having been held in default (Par. 3 [i]), and:

> "That petitioners have been denied their inalienable rights guaranteed in and by the Constitution of the State of Florida, Section 4 of the Declaration of Rights providing: 'All courts of this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy in due course of law.'

And the Constitution of the United States, Amendment XIV, Section 1, providing: '* * * nor shall any state deprive any person of * * * property without due process of the law.'" (Par. 3 [i]).

Wherefore, petitioners respectfully pray that this Honorable Court grant this Petition for Rehearing and upon a rehearing grant the Petition for Writ of Certiorari heretofore filed in this cause, and your petitioners will ever pray.

Respectfully submitted,

JOEL A. MALOY,
RUTH MALOY, His Wife,
Petitioners.

Certificate.

I hereby certify that the above Petition for Rehearing is presented in good faith and not for delay and the reasons urged were not heretofore sufficiently presented.

.....
Ruth Maloy, Petitioner.

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NOV 30 1959
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OCTOBER TERM, 1959

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Respondent

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING.

JOEL A. MALOY,
RUTH MALOY, his wife,
Petitioners,
405 S. E. 4th Avenue,
Delray Beach, Florida.

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Respondent

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING.

Come now your petitioners and respectfully move the Court for leave to file a Second Petition for Rehearing for the reason that the Clerk of this Court advised on October 16, 1959 of the granting of request for a stay of the Order denying the Petition for Writ of Certiorari, but did not advise of the entry of the Order granting request for extension of time to file the Petition for Rehearing, until November 3, 1959, enclosing copy of Order extending the time to and including November 12, 1959. That your petitioners were at a considerable disadvantage in the filing of the Petition for Rehearing due November 6, 1959, as the extension was requested because of the illness of Ruth Maloy, who has prepared and filed the appeal

papers and unaware of the granting of the extension of time, did not have sufficient time to properly prepare and file said Petition.

WHEREFORE, Petitioners respectfully move this Honorable Court for the entry of an Order granting leave to file a Second Petition for Rehearing and allowing 30 days therefor.

Respectfully submitted,

JOEL A. MALOY and
RUTH MALOY,
Petitioners,
405 S. E. 4th Avenue,
Delray Beach, Florida.

(8105-9)